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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

RONALD EDWARD MARKOWSKI,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

Whether *Garrett v. United States*, ____ U.S. ____, 105 S.Ct. 2407 (1985) proscribes a conviction under 21 U.S.C. § 848 where the trial court declined to charge the trial jury that the predicate acts had to be intentionally and knowingly committed and the two (2) suggested Title 21 predicate acts involved less than four (4) grams of cocaine?

(A)

Whether the Title 21 predicate act offenses must be alleged in the indictment as substantive offenses?

CERTIFICATE OF INTEREST

The Petitioner, RONALD EDWARD MARKOWSKI, is represented in these proceedings by Attorney Allan A. Ackerman, Esq., 2000 N. Clifton Avenue, Chicago, Illinois 60614.

Neither party has any other interest nor represents any other party or interest in these proceedings.

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For the Petitioner,
Ronald E. Markowski

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RONALD EDWARD MARKOWSKI,

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vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, RONALD EDWARD MARKOWSKI, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on September 10, 1985.

OPINION BELOW

The opinion of the Court of Appeals is reported at 772 F.2d 358 (7th Cir. 1985) and is attached to this Petition as Group Appendix A.

JURISDICTION

The judgment of the Court of Appeals was entered on September 10, 1985. A timely petition for rehearing with *en banc* suggestion was denied on November 1, 1985. The denial of the petition for rehearing is attached as Appendix B.

The jurisdiction of this Court is invoked pursuant to both 28 U.S.C. §§ 1254(1) and 1257(3).

STATUTE INVOLVED

21 U.S.C. § 848. Continuing criminal enterprise

Penalties; forfeitures

(a) Any person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment which may not be less than 10 years and which may be up to life imprisonment, to a fine of not more than $100,000, and to the forfeiture prescribed in section 853 of this title; except that if any person engages in such activity after one or more prior convictions of him under this section have become final, he shall be sentenced to a term of imprisonment which may not be less than 20 years and which may be up to life imprisonment, to a fine of not more than $200,000, and to the forfeiture prescribed in section 853 of this title.

Continuing criminal enterprise defined

(b) For purposes of subsection (a) of this section, a person is engaged in a continuing criminal enterprise if—

(1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and

(2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter—

(A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and

(B) from which such person obtains substantial income or resources.

Suspension of sentence and probation prohibited

(c) In the case of any sentence imposed under this section, imposition or execution of such sentence shall not be suspended, probation shall not be granted, and section 4202 of Title 18 and the Act of July 15, 1932 (D.C. Code, secs. 24-203 to 24-207), shall not apply.

(Pub. L. 91-513, Title II, § 408, Oct. 27, 1970, 84 Stat. 1265; Pub. L. 98-473, Title II, § 305, Oct. 12, 1984, 98 Stat. 2030, 2050.)

STATEMENT OF THE CASE

Petitioner was indicted by a federal grand jury, sitting in South Bend, Indiana, in July, 1983. The indictment contained thirty-one (31) counts and the original indictment named forty-one (41) defendants. The petitioner was charged in seventeen (17) counts. The indictment charged the petitioner with violating a series of federal drug related statutes including 21 U.S.C. § 848 (Count 1); conspiring to im-

port drugs into the United States in violation of 21 U.S.C. §§ 952(a) and 963 (Count 3); conspiring to possess and distribute marijuana and cocaine in violation of 21 U.S.C. §§ 841 and 846 (Count 4); two (2) violations of 21 U.S.C. §§ 841(a)(1) (Counts 24 and 26) and some twelve (12) separate Travel Act counts in violation of both 18 U.S.C. §§ 2 and 1952.

Petitioner's trial was severed from that of his co-defendants and jury trial commenced on March 20, 1984 before the Honorable Judge Michael S. Kanne in the U.S. District Court, Hammond, Indiana.

At the close of the government's case six (6) counts were dismissed and eventually, the jury returned guilty verdicts on nine (9) counts including the count relating to Continuing Criminal Enterprise (21 U.S.C. § 848).[1]

On May 18, 1984 the Petitioner was sentenced to forty-five (45) years in custody, without parole and fined $100,000.00 on the continuing criminal enterprise conviction.[2]

---

[1] Judge Kanne instructed the jury NOT to return verdicts on the two (2) conspiracy counts if they found petitioner guilty of the Continuing Criminal Enterprise count (Tr. 3354).

Thus the jury returned no verdicts as to counts 3 and 4; those counts alleging violations of 21 U.S.C. § 846, § 952(a) and § 963.

The only Title 21 counts submitted to the jury were Counts 24 and 26; these two (2) counts, in combination, consisted of petitioner distributing less than four (4) grams of cocaine.

The trial court struck the six (6) Travel Act Counts as potentially predicate acts for the CCE Count (Count 1).

[2] On the six (6) Travel Act convictions petitioner was sentenced to five (5) years on each count; same to run consecutive to one another. These were counts 10, 17, 21, 28, 29 and 30. Petitioner was also sentenced to seven (7) years on each of the two (2) cocaine delivery counts and these counts were to run consecutive to one another and consecutive to the Travel Act counts for a total of forty-four (44) years. Thus, the forty-four (44) year sentences were to run concurrent to the forty-five (45) year sentence imposed on the § 848 conviction (Tr. 3617-3618).

REASONS FOR GRANTING THE WRIT

Whether *Garrett v. United States*, ___ U.S. ___, 105 S.Ct. 2407 (1985) proscribes a conviction under 21 U.S.C. § 848 where the trial court declined to charge the trial jury that the predicate acts had to be intentionally and knowingly committed and the two (2) suggested Title 21 predicate acts involved less than four (4) grams of cocaine?

(A)

Whether the Title 21 predicate act offenses must be alleged in the indictment as substantive offenses?

On April 12, 1984 the trial court conducted a Rule 30 conference at 8:15 p.m. The jury had been sent home anticipating that closing arguments would commence at 9:00 a.m. the next morning.

On April 12, 1984 prior to the instruction conference the defense motion for a judgment of acquittal at the close of all the evidence was denied (Tr. 3318).

During the charge conference defense counsel requested that the elements and requirements be given the jury as to each count of the indictment (Tr. 3325, 3327). In addition, defense counsel requested that the court charge the jury on lesser-included offenses in that Counts 24 and 26 of the indictment[3] alleged violations of 21 U.S.C. § 841(a)(1)

[3] Count 24 alleged that petitioner gave a government witness approximately 3 grams of cocaine on the 6th day of October, 1982. Count 26 similarly alleged that petitioner gave a government witness a similarly minute quantity of cocaine on the 13th day of October, 1982.

Counts 24 and 26 were the only substantive Title 21 offenses which were the subjects of guilty verdicts in this case. Thus, they stand as two (2) of the predicate offenses needed to sustain a conviction as per 21 U.S.C. § 848.

and Count 1 alleged a violation of 21 U.S.C. § 848. The government objected and no lesser-included offense instruction was given the jury. The trial judge refused all the tendered defense and government instructions (Tr. 3333). The instruction conference ended at 9:30 p.m. on April 12, 1984.

Post closing arguments, the trial court charged the jury on April 13, 1984. The jury charge runs from Tr. 3545 to 3573.

The trial court first summarized the various counts in the indictment[4] and then the trial court instructed the jury as to the ELEMENTS of Count 1 of the indictment (the CCE Count, Tr. 3550-3554). The trial judge instructed the jury that Counts 3 and 4 (conspiracy/drug counts under 21 U.S.C. §§ 841, 846, 952 and 963) were lesser-included offenses and that they should not consider those Counts unless and until they decided the petitioner's guilt *vel non* on Count 1 (Tr. 3554). The trial judge did not tell the jury that the defendant had to commit the acts comprising Count 1 in any knowing, intentional or wilfull manner.

The trial court then instructed the jury as to the lesser-included conspiracy counts (Counts 3 and 4, Tr. 3554-3557).

The trial judge thereafter charged the jury as to all the Travel Act Counts (Tr. 3557-3559) and, finally, the trial

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[4] The original indictment was 77 pages in length and involved multiple defendants. Petitioner was severed and only Counts 1 (CCE), 3 (21 U.S.C. §§ 952 and 963), 4 (21 U.S.C. §§ 841(a) and 846), Counts 10, 17, 21, 28, 29 and 30 were all Travel Acts under 21 U.S.C. §§ 2 and 1952; Counts 24 and 26 were violations of 21 U.S.C. § 841(a)(1) . . . (see n.2, *ante*) were submitted to the jury.

judge charged the jury as to the two (2) potentially predicate Title 21 offenses, Counts 24 and 26.[5]

The trial judge, toward the end of his charge, added the following:

> "When the word 'knowingly' is used in these instructions, it means that the defendant realized what he was doing and was aware of the nature of his conduct, and did not act through ignorance, mistake or accident. Knowledge may be proved by the defendant's conduct, and by all the facts and circumstances surrounding the case.
>
> The word 'willfully,' as that term is used in these instructions, means that the act was committed voluntarily and purposely, with the specific intent to do something the law forbids; that is to say, with bad purpose either to disobey or disregard the law.
>
> The question of a defendant's intent is a matter for you to determine, and, since intent is a state of mind and it is not possible to look into a person's mind to see what went on, the only way you have of arriving at the intent of a defendant in this case is for you to take into consideration all of the facts and circumstances shown by the evidence and determine from all such facts and circumstances what the intent of a defendant was at the time or times in question." (Tr. 3561-3562)

These three (3) paragraphs are the totality of the instructions on knowledge, willfullness and intent. The petitioner was charged in the indictment (as the jury got the summary of the indictment) with three (3) separate conspiracies (Counts 1, 3 and 4), six (6) violations of 18 U.S.C. §§ 2 and 1952 and two (2) additional counts relating to

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[5] The petitioner distributed far less than Four (4) grams, totally, in connection with Counts 24 and 26.

the distribution of minute quantities of cocaine in violation of 21 U.S.C. § 841(a)(1) in Counts 24 and 26.

Notwithstanding the multiple conspiracy and substantive counts the trial court's charge had only the paucity of language reproduced from Tr. 3561-3562 of the trial transcript.

As regarding additional elements of § 848 the trial court charged the jury:

> "As to the second element, the term 'series' means 'three or more' and the term 'continuing' means enduring, subsisting for a definite period or intended to cover or apply to successive similar occurrences. Therefore to satisfy the second element you must find that the defendant committed three or more successive violations of federal narcotics laws over a definite period of time with a single or substantially similar purpose. Such activities cannot be sporadic and isolated in nature, but rather must be part of an ongoing and connected pattern of activity engaged in by the defendant. You must unanimously agree as to which three offenses constituted the continuing series of violations." (Tr. 3552)

The jury convicted the petitioner on all counts on April 13, 1984 and the petitioner was subsequently sentenced to forty-five (45) years in custody under Count 1 (the CCE Count) and forty-four (44) years in custody on the balance of the counts; the sentences to run concurrent with one another.

The Court of Appeals for the Seventh Circuit affirmed in part, reversed in part. That Court reversed the conviction on Count 29 (a Travel Act Count) based on lack of evidence (772 F.2d at 365).

The petitioner maintains that this Court should accept this petition and resolve the questions not answered in

Garrett v. United States, ____ U.S. ____, 105 S.Ct. 2407 (1985).

In *Dowling v. United States*, ____ U.S. ____, 105 S.Ct. 3127 (1985) the Court reversed convictions finding that 18 U.S.C. § 2314 was not applicable:

> Federal crimes, of course, "are solely creatures of statute." *Liparota v. United States*, ____ U.S. ____, ____, 105 S.Ct. 2084, 2087, 85 L.Ed.2d 434 (1985), citing *United States v. Hudson*, 7 Cranch 32, 3 L.Ed. 259 (1812). Accordingly, when assessing the reach of a federal criminal statute, we must pay close heed to language, legislative history, and purpose in order strictly to determine the scope of the conduct the enactment forbids. Due respect for the prerogatives of Congress in defining federal crimes prompts restraint in this area, where we typically find a "narrow interpretation" appropriate. See *Williams v. United States*, 458 U.S. 279, 290, 102 S.Ct. 3088, 3094, 73 L.Ed.2d 767 (1982). (105 S.Ct. at 3131-3132).

As *Garrett, ante*, makes obvious . . . § 848 is a creature of statute.

In *Liparota v. United States*, ____ U.S. ____, 105 S.Ct. 2084 (1985) the Court reversed a conviction under 7 U.S.C. § 2024 (Food Stamp Fraud) finding that the trial court erred while declining to charge the jury on knowledge and intent. The Court of Appeals for the Seventh Circuit affirmed the conviction below based upon Circuit precedent . . . *United States v. Arambasich*, 597 F.2d 609 (CA 7, 1979) (specific intent instructions are frowned on in the Seventh Circuit).

In *Liparota* the Court ultimately ruled that unless the government proved the required *mens rea* and unless the trial court properly instructed on "intent" then, the conviction could not stand. Thus, the Court reversed the Seventh Circuit affirmation in *Liparota*.

In *Garrett v. United States*, ____ U.S. ____, 105 S.Ct. 2407 (1985) the Court affirmed an order below declining to vacate either the conviction or sentence in connection with a § 848 conviction where the primary question on appeal seemed to be whether the Double Jeopardy Clause of the Fifth Amendment proscribed the conviction and sentence in that case. *Garrett* had been indicted in the State of Washington for federal drug offenses. He pled guilty to a certain count of that indictment and was sentenced to five (5) years in custody. He was later indicted in the U.S. District Court in Miami, Florida, for violating § 848 and of the four (4) predicate underlying events alleged in that indictment . . . the Washington prosecution facts were alleged. *Garrett* was convicted and the Court affirmed both the conviction and sentence. The Court reviewed § 848 finding, *inter alia*, that the three (3) predicate events were sufficient to sustain the conviction; the fourth perhaps, unnecessary, not only to the § 848 indictment but, unnecessary to the conviction.

The Court did not dwell, in *Garrett*, on the essential elements necessary for the conviction (see the concurring opinion by Justice O'Connor, 105 S.Ct. 2420-2422). Justice O'Connor in her concurring opinion, summed up the focus of the *Garrett* majority decision as follows:

> For the reasons stated, I agree that under the circumstances of this case the Double Jeopardy Clause does not bar Garrett's prosecution under § 848. Because I also agree that Congress intended to authorize separate punishment for the underlying predicate offenses and the violation of § 848, I join the opinion of the Court. (____ U.S. ____, 105 S.Ct. at 2422).

The instant petition questions whether petitioner may stand convicted of violating 21 U.S.C. § 848 under circumstances where the trial judge did not charge the jury as

to the intent, knowledge and willfulness necessary to stand convicted NOT ONLY of the § 848 but, also, the predicate acts necessary as a foundation for the CCE conviction.[6]

In *United States v. U.S. Gypsum*, 438 U.S. 422, 98 S.Ct. 2864 (1978) the Court affirmed the order below, said order below having granted U.S. Gypsum a new trial in a criminal antitrust case. The thrust of a portion of the Court's opinion related to the necessary criminal intent to sustain a criminal antitrust conviction. The Court concluded that INTENT was [is] a necessary element of the criminal antitrust violation and thereafter found that the instruction(s) to the jury were inadequate, 438 U.S. at 442-446, 98 S.Ct. at 2876-2878.[7]

The Court, in *U.S. Gypsum*, found that in a conspiracy prosecution two (2) different types of intent are required. The Court noted:

> "In a conspiracy, two different types of intent are generally required—the basic intent to agree, which is necessary to establish the existence of the *conspiracy*, and the more traditional intent to effectu-

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[6] Even while affirming petitioner's conviction the Court of Appeals makes pointed reference that both the government and defense counsel sought more detailed instructions [than the trial court either wanted to give, or ultimately gave], 772 F.2d at 365, n.3.

LEST THERE BE ANY CONFUSION . . . THE TRIAL COURT STRUCK THE TRAVEL ACT PREDICATE CRIME ALLEGATION FROM THE C.C.E. COUNT, BUT REFUSED TO STRIKE THE CONSPIRACIES FROM THE SAME COUNT (Tr. 2854-2869). This becomes important because the trial court gave only vague and insufficient instructions as to intent and knowledge while charging the jury, *vis-a-vis*, the conspiracies as alleged in Counts 3 and 4 of the indictment.

[7] The Court makes reference to the ALI Model Penal Code in connection with questions of this type (438 U.S. at 444, 98 S.Ct. at 2877).

ate the object of the conspiracy. See W. LaFave & A. Scott, Criminal Law 464-465 (1972). Our discussion here focuses only on the second type of intent." (emphasis added; 98 S.Ct. at 2877, n. 20).

In *United States v. Bailey*, 444 U.S. 394, 100 S.Ct. 624 (1980), the Court vacated a decision wherein certain escaped prisoners were granted a new trial based, *inter alia*, on flawed jury instructions. This Court reversed. Within the text of the decision the Court noted:

> "Another such example is the law of inchoate offenses such as attempt and conspiracy, *where a heightened mental state separates criminality itself from otherwise innocuous behavior.* See Model Penal Code § 2.02, Comments, p. 125 (Tent. Draft No. 4, 1955) (hereinafter MPC Comments)." (444 U.S. at 405, 100 S.Ct. at 632).
>
> * * * * * *
>
> "is the same state of mind required of the actor for each element of the crime, or may some elements require one state of mind and some another? In *United States v. Feola*, 420 U.S. 671, 95 S.Ct. 1255, 43 L.Ed. 2d 541 (1975), for example, we were asked to decide whether the Government, to sustain a conviction for assaulting a federal officer under 18 U.S.C. § 111, had to prove that the defendant knew that his victim was a federal officer. After looking to the legislative history of § 111, we concluded that Congress intended to require only 'an intent to assault, not an intent to assault a federal officer.' 420 U.S., at 684, 95 S.Ct., at 1264. What *Feola* implied, the American Law Institute stated: '*[C]lear analysis requires that the question of the kind of culpability required to establish the commission of an offense be faced separately with respect to each material element of the crime[.]*' MPC Comments 123. See also Working Papers 131; LaFave & Scott 194." (emphasis added; 444 U.S. at 405, 406, 100 S.Ct. at 632).

In the instant case, Petitioner, at age 48, is given a forty-five (45) year prison sentence based upon his violating 21 U.S.C. § 848. To be sure, this sentence is tantamount to a death sentence in that § 848 provides NO PAROLE.

During the instruction conference (per Rule 30) counsel for the petitioner was told by the trial court that the trial court's charge to the jury would include a summary of the indictment and a summary of each offense.

Counsel for the petitioner requested that the indictment be submitted to the jury while stating:

> "I don't believe the summary can give all the elements and the requirements of the various counts" (Tr. 3325).

The trial court responds that the Court's instruction #8 specifically and thoroughly goes through the elements as to each count (Tr. 3326) but as the petitioner points out:

> "Your Honor, specifically we would ask one of these, that it has to be knowingly and wilfully and criminal intent to do these things . . ." (Tr. 3327).
>
> * * * * * *
>
> ". . . We would specifically request that each one state that Mr. Markowski must do it knowingly and wilfully to attempt to commit a crime." (Tr. 3327).

Notwithstanding . . . these timely urgings . . . the trial court declined to charge the jury specifically as to the elements of intent as to each of the offenses alleged.[8]

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[8] The petitioner had been charged with two (2) separate conspiracies under Title 21 (counts 3 and 4) and count 1 alleged the violation of 21 U.S.C. § 848. In addition, petitioner was charged with six (6) counts of violating the Travel Act (18 U.S.C. § 2 and § 1952) as well as two (2) additional drug related counts under 21 U.S.C. § 841(a)(1) (counts 24 and 26).

As this Court noted in *Bailey* . . . "[a] heightened mental state separates criminality itself . . . from otherwise innocuous behavior." Thus, the INTENT needed is twofold intent.

Notwithstanding the need for such instructions the trial court offered only a single simple paragraph on knowledge, intent and willfulness (Tr. 3562, reproduced at pg. 7 of this Petition, *ante*).

We add, parenthetically, that the simple element(s) directive was, according to the trial court, adequate to cover not only the multiple Title 21 offenses included in the indictment but, also, the essential elements relative to 18 U.S.C. §§ 2 and 1952.

Garrett speaks to the question of double jeopardy, not to the question of INTENT.

In the instant case the Court of Appeals notes that there are but two (2) Title 21 offenses which can theoretically stand as predicate acts to satisfy the jurisdictional requirement of § 848. Notwithstanding, the only other drug related Title 21 offenses related to counts 3 and 4; and as to those counts, the jury was never instructed as to the different INTENTS that are needed to satisfy constitutional requirements in connection with making sure that the instructions are adequate and correct.

CONCLUSION

The *Garrett* decision has done little to dispel [the] Circuit confusion in connection with predicate acts and 21 U.S.C. § 848 (Cf., *United States v. Young*, 745 F.2d 733, 746-750 (CA 2, 1984)).

The instant petition provides the Court with the appropriate vehicle to put an end to the continuing Circuit confusion insofar as 21 U.S.C. § 848 and predicate acts are concerned.

It is respectfully urged that this Court grant this writ of certiorari to review petitioner's conviction with a view toward reversing his conviction and, at the same time, deciding the appropriate pleadings, proof and instructions that must accompany predicate act proof in cases such as this.

Respectfully submitted,

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GROUP APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 84-1874

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

RONALD MARKOWSKI,

Defendant-Appellant.

Appeal from the United States District Court for the
Northern District of Indiana, Hammond Division.
No. 83 CR 36—**Michael S. Kanne**, *Judge.*

ARGUED MAY 29, 1985—DECIDED SEPTEMBER 10, 1985

Before FLAUM and EASTERBROOK, *Circuit Judges*, and WEIGEL, *Senior District Judge.**

EASTERBROOK, *Circuit Judge.* Ronald Markowski was the kingpin of a marijuana and cocaine smuggling operation. The district court sentenced him to 45 years' imprisonment without possibility of parole under the Continuing Criminal Enterprise statute, 21 U.S.C. § 848, and fined him $100,000. Other sentences under four other statutes run concurrently with this one, making the CCE count the principal object of our attention.

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* The Honorable Stanley A. Weigel, Senior District Judge for the Northern District of California, is sitting by designation.

I

From 1977 through 1982 Markowski led a large group of smugglers who moved marijuana and cocaine from Colombia to Indiana via the Bahamas. The indictment named 41 defendants and many other unindicted conspirators. We affirm the conviction of a defendant who manned an airplane in the Bahamas in *United States v. Molt*, No. 84-3164, also decided today. More than 49,800 pounds of marijuana and 4,100 pounds of cocaine were imported during the course of the conspiracy. The smuggling operation was run like a business, with investors, secretaries, wholesalers, drivers, pilots, and off-loaders all on the operation's payroll. Markowski used a family-owned trucking business, located in East Chicago, Indiana, as one front for his smuggling operation.

Most of the evidence came from smugglers who cooperated with the prosecution. We narrate it in the light most favorable to the Government. In 1977 Markowski joined with two other smugglers to fly marijuana from Colombia to the United States. The aircraft used in this initial operation was purchased through the family business and used only for smuggling. The plane once crashed in Colombia. Markowski flew to Colombia to rescue his pilots and met a Colombian named Moses who later became his major source of drugs.

Markowski continued his smuggling operation in 1978 with at least two other planes. Witnesses testified to specific importations of 1,000 pounds of marijuana in March 1978 and several other importations during the summer of 1978. Sometime in 1978 Markowski ended his association with his original partners and joined with Frank Brady (still a fugitive), George Chiattello (who pleaded guilty), and Terry Lowe (still to be tried) in a larger venture.

The new operation was more structured. Markowski and Lowe had an attorney form a corporation, Marlowe International Investments. The corporation was used to hide Markowski's interest in an aircraft used for smug-

gling. One of Markowski's pilots was named president of the corporation. The Marlowe aircraft was used repeatedly between December 1979 and July 1980 to import marijuana from Colombia. The smuggling continued throughout 1981 and 1982. The normal course of any trip was from Colombia to a stopover in the Bahamas for refueling. The next stop was Georgia or Florida, where the marijuana would be unloaded. The marijuana would then be transported to Northern Indiana or Chicago for distribution.

In 1982 Markowski expanded his operation to include cocaine. The evidence showed not only the importation of planes full of cocaine but also two deliveries of cocaine by Markowski to the offices of the family trucking business.

II

The CCE offense has five elements: (1) a predicate offense violating a specified drug law (2) as part of a "continuing series" of drug violations (3) that occurred while the defendant was acting in concert with five or more other people (4) to whom the defendant occupied the position of an organizer or manager and from which series the defendant (5) obtained substantial income or resources. *Garrett v. United States*, 105 S. Ct. 2407, 2415 (1985), describing 21 U.S.C. § 848(b). Section 848 is "designed to reach the 'top brass' in the drug rings . . . ." *Garrett*, 105 S. Ct. at 2413. See also *United States v. Ambrose*, 740 F.2d 505 (7th Cir. 1984), *cert. denied*, 105 S. Ct. 3479 (1985).

Markowski's principal argument is based on the compound nature of the offense. The prosecution must establish both the predicate offenses and the managerial role. The indictment charged Markowski with two substantive drug offenses, on which he was convicted. Because of the convictions on these predicate offenses, he asserts, the Double Jeopardy Clause of the Fifth Amendment prevents his conviction on the CCE offense, which he characterizes

as a "greater" offense arising from the same facts. We accepted this argument in *United States v. Jefferson*, 714 F.2d 689 (7th Cir. 1983). The Supreme Court rejected an identical argument in *Garrett*. Our holding on this issue in *Jefferson* therefore is no longer controlling, and the double jeopardy objection to the CCE charge fails.

The fact that Markowski was convicted on only two predicate offenses affords him several additional arguments. The parties agreed at trial that a "continuing series" of violations means three or more substantive violations of the drug laws.[1] Markowski argues that § 848 requires three *convictions*, not just three violations. Because the only convictions were on the two counts of distributing cocaine, Markowski says that the Government is one short. The prosecutor responds that "violations," rather than convictions, are enough. The jury was instructed that the overt acts alleged in support of the two conspiracy charges could be used to establish a continuing series of violations.

The language of § 848(b)(2) refers to a "continuing series of violations" of the drug laws but does not define "violation." Several courts have understood "violation" to

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[1] The prosecutor has changed his mind on appeal, arguing that a conviction for conspiracy under 21 U.S.C. § 846 also may be a predicate offense. The indictment charged Markowski with two § 846 conspiracies. But because of the prosecutor's concession this was not litigated in the district court. More, because of *Jefferson*, *supra*, 714 F.2d at 702 n.27, the court instructed the jury that if it found a violation of the CCE statute it should not even return a verdict on the conspiracy counts. The jury followed this instruction. We therefore have no occasion to determine whether *Garrett* and cases such as *United States v. Young*, 745 F.2d 733 (2d Cir. 1984), *cert. denied*, 105 S. Ct. 1842 (1985), and *United States v. Jones*, 763 F.2d 518, 524-25 (2d Cir. 1985), now permit the use of convictions under § 846 as predicate offenses. Certainly a district court should not again tell a jury to return no verdict on a § 846 charge. The jury should find the facts, and then the court should enter whatever judgment is appropriate under the legal rules.

refer to an offense, whether or not the offense led to conviction. See *United States v. Young*, 745 F.2d 733, 747 (2d Cir. 1984) (collecting cases), *cert. denied*, 105 S. Ct. 1842 (1985). As the Supreme Court emphasized in *Garrett*, 105 S. Ct. at 2412-15, the CCE statute is not a sentence enhancement provision or an aggravated version of an offense. It is a distinct crime that entails the supervision of a substantial criminal enterprise. What is important is proof that there was indeed a far-flung operation. Whether this has led to other convictions is all but irrelevant to the nature of the CCE offense. This leads us to interpret "violation" in the natural way as an offense, not as a conviction.

The structure of the statute reinforces the conclusion. The penalty provision in § 848(a) provides for additional enhancement in the event of multiple convictions: "any person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment which may not be less than 10 years . . . , to a fine of not more than $100,000, and to . . . forfeiture . . . ; except that if any person engages in such activity after one or more prior *convictions* of him under this section, he shall be sentenced to a term of imprisonment which may not be less than 20 years . . ." (emphasis added). Subsection (b), in contrast, refers only to "violations." We do not think that Congress used two different words in the same section of the statute to mean the same thing. None of the legislative history, which *Garrett* discusses in detail, leads to a contrary conclusion.

This interpretation of § 848 draws some support from *Sedima, S.P.R.L. v. Imrex Co.*, 105 S. Ct. 3275 (1985). The Second Circuit held that the plaintiff in a private civil action under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-68, must prove that a defendant has been convicted of the predicate acts establishing a pattern of racketeering activity. 741 F.2d 482 (2d Cir. 1984). The Supreme Court disagreed and held that under RICO the plaintiff must show "only to a failure to adhere to legal requirements." 105 S. Ct. at 3281

(citations omitted). RICO and CCE were passed at different times, but they have similar structures. Each is a compound offense in which multiple violations of criminal statutes are essential to a conviction of the new offense. The similar structure of the two laws leads to a conclusion that convictions are not necessary to establish predicate offenses for either statute.

Markowski maintains that even if this is so, the jury was improperly instructed. The court gave a detailed instruction on the elements of the CCE offense. The court told the jury that it first had to find a violation of one of the following drug laws (§ 848(b)(1)):

> (1) It shall be unlawful for any person knowingly or intentionally to distribute or possess with intent to distribute the controlled substances marijuana or cocaine. Title 21, United States Code, Section 841(a); or
>
> (2) It shall be unlawful to import into the United States from any place outside thereof the controlled substances marijuana or cocaine. Title 21, United States Code, Section 952(a).

The court then told the jury that it had to find three or more violations of these laws.[2] In subsequent instructions

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[2] Markowski briefly argues that the court erred by not limiting the jury's consideration to the offenses designated as overt acts of one or another conspiracy. He did not preserve the argument at trial, however. His brief here points to five occasions on which a witness testified to a substantive violation that had not been listed as an overt act. Counsel did not object to the admission of any of this testimony at trial and did not propose an instruction limiting the jury's consideration to offenses listed as overt acts. We therefore need not decide whether to follow cases such as *United States v. Becton*, 751 F.2d 250 (8th Cir. 1984), *cert. denied*, 105 S. Ct. 3480 (1985), and *United States v. Sterling*, 742 F.2d 521 (9th Cir. 1984), *cert. denied*, 105 S. Ct. 2322 (1985), which permit a jury to convict on a CCE charge even though the predicate offenses were not specifically enumerated.

the court explicated the meaning and elements of the possession and distribution offenses, in the course of describing the substantive cocaine crimes with which Markowski had been charged. But it did not give a similarly full treatment to the importation offense. Markowski therefore says that the instruction was defective — it told the jury that it could use violations of § 952(a) as predicate offenses, but it did not tell the jury that importation is unlawful only if done "intentionally and knowingly." The Government apparently concedes that intent is an element of § 952(a). See, e.g., *United States v. Ledezma-Hernandez*, 729 F.2d 310 (11th Cir. 1984); *United States v. Restrepo-Granda*, 575 F.2d 524 (5th Cir.), *cert. denied*, 439 U.S. 935 (1978). It asserts, however, that Markowski did not preserve this claim of error.

Markowski presented the court with an instruction on the mental element of the importation offense. But he never pointed out that the final set of instructions omitted mention of this element. Fed. R. Crim. P. 30 provides that "no party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection." See *United States v. Bush*, 749 F.2d 1227, 1233 (7th Cir. 1984), *cert. denied*, 105 S. Ct. 1771 (1985). This court repeatedly has held that the "mere offer" of an instruction does not satisfy Rule 30 or preserve a claim for appeal. *United States v. Jackson*, 569 F.2d 1003, 1009 (7th Cir.), *cert. denied*, 437 U.S. 907 (1978) (instruction tendered twice); *United States v. Clavey*, 565 F.2d 111, 118 (7th Cir. 1977), *modified on other grounds*, 578 F.2d 1219 (7th Cir. 1978).

This case illustrates the reasons why. The instructions were very long, and some instructions (including the one on CCE) relied on others (such as the charge on the substantive cocaine offenses) for completeness. It is easy to overlook something in such a set of instructions. Unless counsel points precisely to the instruction or omission in question, a general objection will not alert the court to the

problem. The fact that a party has tendered an instruction is all but irrelevant once the court drafts its own. The court may mean to give all of the elements of the defendant's tendered instruction but slip up. Unless the defendant calls the error to the court's attention, the fact that the defendant has a proper instruction on file does no one any good.

Markowski asked for instructions on the elements of the predicate offenses, and the court complied with this request in every respect but one. When Markowski's counsel objected in general to the lack of instructions on the elements, he failed to inform the court which one in particular was missing. The repeated, but repeatedly general, objection may have misled the court, which doubtless thought it had defined all of the elements of the predicate offenses somewhere in the instructions. Markowski's counsel should have pointed out what the judge overlooked. Markowski's counsel "was in the best position to avoid this problem and he failed to act." *Jackson, supra,* 569 F.2d at 1010. He therefore has not preserved the objection under Rule 30.

The omission was not "plain error" within the meaning of Rule 52(b). It was "plain" in the sense that had the judge realized what was missing, doubtless he would have set things straight. But this is not the meaning of "plain error" under the Rule. To determine "whether a defect in a jury instruction is plain error, we must examine the entire record before us and determine whether the instructional mistake had a probable impact on the jury's finding that the defendant was guilty." *Jackson, supra,* 569 F.2d at 1010. See also *Bush, supra,* 749 F.2d at 1233; *United States v. Silverstein,* 732 F.2d 1338, 1349 (7th Cir. 1984), *cert. denied,* 105 S. Ct. 792 (1985). That inquiry leads to a conclusion that the omission was not plain error.

There were numerous charges on mental elements. There was one for the CCE offense itself, one for the substantive counts, one for each of the other founts of liability. Two of the three predicate offenses (possession

and distribution) had mental elements explicitly attached. Nothing in the instructions even hinted that the importation offense might be a strict liability crime.

The importance of the mental element would not have occurred to the jury because of the nature of Markowski's defense. As Markowski's brief describes things, the only contested factual issues "primarily concerned whether the cooperating witnesses were lying or not." Markowski's own testimony was a blanket denial that any importation or distribution had occurred. This was not a case in which the accused admitted that he flew planes on which drugs were found but denied knowledge that drugs were on board. Cf. *United States v. Rada-Solano*, 625 F.2d 577 (5th Cir.), *cert. denied*, 449 U.S. 1021 (1980); *United States v. Restrepo-Granda*, *supra*. Once the jury rejected the claim that the witnesses made everything up — which it plainly did — nothing remained but to convict on the overwhelming evidence provided by Markowski's fellow smugglers. See *Jackson*, *supra*, 569 F.2d at 1010. Indeed, the jury's rejection of Markowski's blanket denial left it with credited evidence of a score of possession and distribution violations, supporting the CCE conviction without regard to any importation offenses. We therefore conclude that the omission is not "plain error" as we have construed that term.

The final challenge to the conviction on the CCE offense is that the judge did not require the jury to agree unanimously on the identity of at least five people who acted under Markowski's supervision. The statute does not make the identity of the five important, however. The CCE statute is directed against all enterprises of a certain size; the identity of those involved is irrelevant. 21 U.S.C. § 848(b)(2)(A). The court told the jury that it had to agree unanimously that there were five or more subordinates. So long as each juror believed that Markowski supervised enough people, the jury was entitled to convict. All other courts that have addressed this question have come to the same conclusion. *United States v. Jones*, 712 F.2d 1316, 1322 (9th Cir.), *cert. denied*, 464 U.S. 986

(1983); *United States v. Mangieri*, 694 F.2d 1270, 1279-81 (D.C. Cir. 1982); *United States v. Raffone*, 693 F.2d 1343, 1347-48 (11th Cir. 1982), *cert. denied*, 461 U.S. 931 (1983).

III

Markowski was convicted of six violations of the Travel Act, 18 U.S.C. § 1952, because of his interstate movements to carry out prohibited acts. His principal argument here is that the district court should have given a specific intent instruction concerning the Travel Act offenses.

The court adequately described and defined for the jury the elements of the Travel Act. The court read the statute in its entirety and separately stated that the interstate travel must be done "with intent to promote, manage, establish, carry on, or facilitate the promotion, management, establishment or carrying on of any unlawful activity, involving marijuana or cocaine." The court then said that the jury may infer intent from all "facts and circumstances" surrounding Markowski's acts. It did not further define what "intent" means. The court also told the jury that Markowski could be guilty under 18 U.S.C. § 2 if he "wilfully causes an act to be done" that would be criminal if Markowski had performed it himself. A separate instruction defined wilful to mean that "the act was committed voluntarily and purposely, with the specific intent to do something the law forbids; that is to say, with bad purpose either to disobey or disregard the law."

The instruction on § 2 was more than enough. The instruction on the Travel Act itself left "intent" undefined. This is a troubling omission, because the defendant must intend to carry on or facilitate a prohibited activity through the travel. The omission of a more detailed instruction may have confused the jury about whether the illegality of the promoted activity need be present to the defendant's mind during the travel. Only because the intent requirement does not reach quite this far, cf.

United States v. Vanichromanee, 742 F.2d 340, 349-50 (7th Cir. 1984); *United States v. McPartlin*, 595 F.2d 1321, 1361 (7th Cir.), *cert. denied*, 444 U.S. 833 (1979); *United States v. Craig*, 573 F.2d 455, 489 (7th Cir. 1977), *cert. denied*, 439 U.S. 820 (1978), are we able to sustain this instruction.

There are very subtle distinctions among kinds of "intent." The Model Penal Code recognizes four mental states — purpose, knowledge, recklessness and negligence — with elaborations possible for each. Model Penal Code § 2.02; cf. *Liparota v. United States*, 105 S. Ct. 2084 (1985); *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978). The distinctions among them tax the greatest interpreters. The piling of explanation on explanation in an effort to clarify what intent means may have the opposite effect. We have therefore held that with rare exceptions, see *United States v. Barclay*, 560 F.2d 812 (7th Cir. 1977), a court need not elaborate for the jury on the differences between general and specific intent. *United States v. Brown*, 739 F.2d 1136, 1143 (7th Cir.), *cert. denied*, 105 S. Ct. 331 (1984); *United States v. Arambasich*, 597 F.2d 609, 611 (7th Cir. 1979). A jury should be told only what it needs to know, not what might confuse.

The jury was told what it needed to know here — that the intent element of the Travel Act applies to the purpose of the travel. The defendant must intend that the travel promote or carry on an unlawful activity. The jury was told this. The court defined "knowingly" and "wilfully" in separate instructions. Further elaboration about intent would not have brought further enlightenment. If the jury believed that Markowski travelled (or wilfully caused others to travel) for the purpose of promoting or carrying on his smuggling acts, it would have had no further questions on which elucidation would have helped. We would be troubled by a guidance-free instruction such as this one when the defendant puts in issue questions concerning the degree of his mental awareness. If Markowski had claimed, for example, that he travelled with reckless indifference to the consequences for the smuggling venture, the court would have been well ad-

vised to elaborate a little on the meaning of intent. But the instruction, simple though it was, was adequate to the purpose of this trial, which raised none of the nuances about mental states that have so vexed courts in the past.[3]

Although the instructions were adequate, the evidence on one of the Travel Act counts does not establish an offense. Count 29 charged that on December 9, 1982, Markowski caused John Parker to travel from Elkhart, Indiana, to Chicago, Illinois, to promote his drug operation by buying Parker dinner in the hopes of obtaining favorable treatment for Markowski's family business. Parker had been a friend of Markowski's for at least ten years before the smuggling operation began. In the late 1960s the Markowski family trucking company, E.L.M. Enterprises, began to carry goods for Miles Laboratory, Parker's employer. ELM struggled to keep some of Miles's business when Miles changed its production needs, which required ELM to purchase new types of trucks. Parker, the production manager, was able to influence whether Miles would continue to use ELM. Markowski cultivated Parker as a friend for social as well as business reasons. But the connection between Parker and Markowski was a direct result of a legitimate business relation between ELM and Miles. Parker apparently had nothing to do with smuggling.

The Government contends that when Markowski flew Parker to Chicago for dinner he was in fact furthering his drug enterprise by trying to keep one of his fronts for the drug enterprise afloat. If this is enough to violate the Travel Act, however, then everything ELM did — including carrying Miles's goods from one state to another — violated the Act. The statute does not make every

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[3] Both the prosecutor and counsel for Markowski requested a more detailed instruction. This case once again illustrates the wisdom of our caution in *Barclay, supra*, 560 F.2d at 815 n.2, that a court should have good reasons before declining to give an instruction tendered by both sides. A more cautious approach here would have averted a difficult issue.

legitimate act unlawful on the ground that legitimate acts help hide illegitimate ones. The Act is broad, but it is not yet unlawful to take a legitimate business friend to dinner to promote lawful business. The evidence on this count fails to establish that Markowski caused the interstate travel with the intent to promote an illegal activity. The travel related to the illegal activity only incidentally, which is not enough. *Vanichromanee, supra*, 742 F.2d at 349; *United States v. Raineri*, 670 F.2d 702, 717 (7th Cir.), *cert. denied*, 459 U.S. 1035 (1982) (travel "must relate significantly, rather than incidentally or minimally, to the illegal activity").

IV

Markowski attacks all of his convictions on the ground that the court admitted a statement by James Millsap, one of Markowski's underlings, that Markowski warned Millsap not to cooperate with the Government should it investigate his drug operation. Millsap testified that Markowski pointed to the open field in which they were standing and stated: "There's plenty of room out here, you know, for people to disappear and be buried and have lime thrown on top of their bodies." This testimony, Markowski tells us, does not comport with Fed. R. Evid. 401, 403, and 404(b) because it was irrelevant and its probative value was substantially outweighed by its undue prejudice. The Government argues that this testimony was admissible because the statement was made during the conspiracy and was designed to prolong the life of the conspiracy.

The testimony is relevant. Statements of conspirators may be admitted to prove a conspiracy's existence. *United States v. Hickerson*, 732 F.2d 611, 615 (7th Cir.), *cert. denied*, 105 S. Ct. 159 (1984). The testimony was useful here because Markowski denied that any illegal drug enterprise existed and accused ex-employees such as Millsap of lying. Testimony about a death threat showed the lengths to which Markowski would go in order to

protect the secrecy of his enterprise, and it tended to undercut Markowski's credibility as a witness.

With respect to the balancing of relevance and prejudicial effect under Rule 403, we accord "great deference" to the district court's decision. *United States v. Pizarro*, 756 F.2d 579 (7th Cir.), *cert. denied*, 105 S. Ct. 2686 (1985); *United States v. Medina*, 755 F.2d 1269, 1274 (7th Cir. 1985); *United States v. Serlin*, 707 F.2d 953, 959 (7th Cir. 1983). The court did not abuse its discretion here. During a hearing outside the presence of the jury, the court considered the question carefully and then admonished Millsap to relate only what he was told, not how he felt during or after the statements. The court also knew that testimony about another threat of death had been admitted without any objection by defense counsel, and it was entitled to believe that the jury's knowledge of yet another threat would not unduly undercut Markowski's defense.

The conviction on Count 29 is reversed. The convictions on all other counts are affirmed.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

November 1, 1985.

Before

Hon. JOEL M. FLAUM, *Circuit Judge*
Hon. FRANK H. EASTERBROOK, *Circuit Judge*
Hon. STANLEY A. WEIGEL, *Senior District Judge**

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 84-1874 vs.

RONALD MARKOWSKI,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.
No. 83 CR 36
Michael S. Kanne, *Judge.*

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* The Honorable Stanley A. Weigel, Senior District Judge for the Northern District of California, is sitting by designation.

ORDER

Defendant-appellant filed a petition for rehearing and suggestion of rehearing en banc on September 24, 1985. No judge in regular active service has requested a vote on the suggestion of rehearing en banc, and all of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

GROUP APPENDIX C

§ 2. Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which is directly performed by him or another would be an offense against the United States, is punishable as a principal.

(As amended Oct. 31, 1951, c. 655, § 17b, 65 Stat. 717.)

§ 1952. Interstate and foreign travel or transportation in aid of racketeering enterprises

(a) whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics or controlled substances (as defined in section 102(6) of the Controlled Substances Act), or prostitution offenses in violation of the laws of the State in which they are

committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

(c) Investigations of violations under this section involving liquor shall be conducted under the supervision of the Secretary of the Treasury.

(Added Pub.L. 87-228, § 1(a) Sept. 13, 1961, 75 Stat. 498 and amended Pub.L. 91-513, Title II, § 701(i)(2), Oct. 27, 1970, 84 Stat. 1282.)

References in Text. Section 102(6) of the Controlled Substances Act, referred to in subsec. (b)(1), is classified to section 802(6) of Title 21, U.S.C.A., Food and Drugs.

§ 841. Prohibited acts A

Unlawful acts

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

§ 846. Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

(Pub. L. 91-513, Title II, § 406, Oct. 27, 1970, 84 Stat. 1265.)

§ 952. Importation of controlled substances

Controlled substances in schedules I or II and narcotic drugs in schedules III, IV, or V; exceptions

(a) It shall be unlawful to import into the customs territory of the United States from any place outside thereof (but within the United States), or to import into the United States from any place outside thereof, any controlled substance in scheule I or II of subchapter I of this chapter, or any narcotic drug in schedule III, IV, or V of subchapter I of this chapter, except that—

(1) such amounts of crude opium, poppy straw, concentrate of poppy straw, and coca leaves as the Attorney General finds to be necessary to provide for medical, scientific, or other legitimate purposes, and

(2) such amounts of any controlled substance in schedule I or II or any narcotic drug in schedule III, IV, or V that the Attorney General finds to be necessary to provide for the medical, scientific, or other legitimate needs of the United States—

(A) during an emergency in which domestic supplies of such substances or drug are found by the Attorney General to be inadequate,

(B) in any case in which the Attorney General finds that competition among domestic manufacturers of the controlled substance is inadequate and will not be rendered adequate by the registration of additional manufacturers under section 823 of this title, or

(C) in any case in which the Attorney General finds that such controlled substance is in limited quantities exclusively for scientific, analytical, or research uses,

may be so imported under such regulations as the Attorney General shall prescribe. No crude opium may be so imported for the purpose of manufacturing heroin or smoking opium.

Nonnarcotic controlled substances in schedules III, IV, or V

(b) It shall be unlawful to import into the customs territory of the United States from any place outside thereof (but within the United States), or to import into the United States from any place outside thereof, any nonnarcotic controlled substance in schedule III, IV, or V, unless such nonnarcotic controlled substance—

(1) is imported for medical, scientific, or other legitimate uses, and

(2) is imported pursuant to such notification, or declaration, or in the case of any nonnarcotic controlled substance in schedule III, such import permit, notification, or declaration, as the Attorney General may be regulation prescribe, except that if a nonnarcotic controlled substance in schedule IV or V is also listed in schedule I or II of the Convention on Psychotropic Substancs it shall be imported pursuant to such import permit requirements, prescribed by regulation of the Attorney General, as are required by the Convention.

Coca leaves

(c) In addition to the amount of coca leaves authorized to be imported into the United States under subsection (a) of this section, the Attorney General may permit the importation of additional amounts of coca leaves. All cocaine and ecgonine (and all salts, derivatives, and preparations from which cocaine and ecgonine may be synthesized or made) contained in such additional amounts of coca leaves imported under this subsection shall be destroyed under the supervision of an authorized representative of the Attorney General.

(Pub.L. 91-513, Title III, § 1002, Oct. 27, 1970, 84 Stat. 1285; Pub.L. 95-633, Title I, § 105, Nov. 10, 1978, 92 Stat. 3772; Pub.L. 98-473, Title II, §§ 519-521, Oct. 12, 1984, 98 Stat. 2075.)

References in Text. Schedules I, II, III, IV, and V of subchapter I of this chapter, referred to in subsecs. (a) and (b), are set out in section 812(c) of this title.

§ 963. Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

(Pub.L. 91-513, Title III, § 1013, Oct. 27, 1970, 84 Stat. 1291.)

References in Text. This subchapter, referred to in text, was in the original "this title" meaning Title III of Pub. L. 91-513, Oct. 27, 1970, 84 Stat. 1285. Part A of Title III comprises this subchapter. For classification of Part B, consisting of sections 1101 to 1105 of Title III, see U.S.C.A. Tables volume.

Rule 30. Instructions

At the close of the evidence or at such earlier time during the trial as this court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury and, on request of any party, out of the presence of the jury.

(As amended Feb. 28, 1966, eff. July 1, 1966.)

NOTES OF ADVISORY COMMITTEE ON RULES

This rule corresponds to Rule 51 of the Federal Rules of Civil Procedure, 28 U.S.C., Appendix, the second sentence alone being new. It seemed appropriate that on a point such as instructions to juries there should be no difference in procedure between civil and criminal cases.

1966 AMENDMENT

The amendment requires the court, on request of any party, to require the jury to withdraw in order to permit full argument of objections to instructions.